Harpers Trading (M) Sdn Bhd v Davids Distribution Sdn Bhd

HIGH COURT (KUALA LUMPUR) — WINDING UP NO D5–28-846 OF 1998
STEVE SHIM J
19 JULY 1999

Companies and Corporations — *Winding up — Application for stay of winding up proceedings — Winding up petition not yet heard — Whether court is empowered under ss 221 and 222 of Companies Act 1965 to grant respondent's application for stay*

The respondent has applied for stay of winding up proceedings pending the disposal of the respondent's application for a restraining order under s 176(10) of the Companies Act 1965 ('the Act'). The application was made pursuant to ss 221 and 222 of the Act. The issue was whether the court is empowered to grant the respondent's application for stay of the winding-up petition taken out by the petitioner in light of the factual situation in the case.

Held, dismissing the application:

Section 221 of the Act as a whole is only applicable in a situation where the winding up petition is being heard. It is not applicable to the present application because the actual winding-up petition has yet to come up for hearing (see pp 335I–336A). Having regard to the facts and circumstances of this case, the court has no power or jurisdiction under ss 221 or 222 of the Act to entertain the respondent's motion for stay of the winding up petition (see p 336E); *Shing Hup Hin Construction Sdn Bhd v General Soil Engineering Sdn Bhd* [1999] 1 MLJ 167 followed.

[Bahasa Malaysia summary

Responden telah memohon untuk penangguhan prosiding penggulungan sehingga penyelesaian permohonan responden untuk perintah menegah di bawah s 176(10) Akta Syarikat 1965 ('Akta tersebut'). Permohonan tersebut dibuat menurut ss 221 dan 222 Akta tersebut. Isu adalah sama ada mahkamah diberi kuasa untuk membenarkan permohonan responden untuk suatu penangguhan petisyen penggulungan tersebut yang dipohon oleh pempetisyen memandangkan keadaan-keadaan fakta di dalam kes ini.

Diputuskan, menolak permohonan tersebut:

Seksyen 221 Akta tersebut secara menyeluruh hanya terpakai di dalam situasi di mana petisyen penggulungan didengar. Ia tidak terpakai kepada permohonan ini kerana petisyen penggulungan yang sebenarnya belum lagi dipanggil untuk perbicraaan (lihat ms 335I–336A). Memandangkan fakta-fakta dan keadaan-keadaan kes,

A mahkamah tiada kuasa dan bidang kuasa di bawah ss 221 atau 222 Akta tersebut untuk melayan usul responden untuk menangguh petisyen peng-gulungan tersebut (lihat ms 336E); *Shing Hup Hin Construction Sdn Bhd v General Soil Engineering Sdn Bhd* [1999] 1 MLJ 167 diikut.]

B

Notes

For cases on stay of winding up proceedings, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 560–561.

C **Cases referred to**

Shing Hup Hin Construction Sdn Bhd v General Soil Engineering Sdn Bhd [1999] 1 MLJ 167 (folld)

Foursea Construction (M) Sdn Bhd [1998] 4 MLJ 99 (refd)

D **Legislation referred to**

Companies Act 1965 ss 176(10), 221, 222

Lim Chee Wee (*Skrine & Co*) for the petitioner.
Manjit Singh (*Govindasamy Khan & Co*) for the respondent.

E **Steve Shim J**: By a notice of motion (encl 15), the respondent has applied, pursuant to s 222 of the Companies Act 1965, for stay of winding up proceedings filed by the petitioner pending the disposal of the respondent's application for a restraining order under s 176(10) of the same Act, the hearing of which has been fixed in Court I on 22 July 1999. He has F amended the motion to include s 221. The motion is supported by the affidavits of Lim Poon Thoo, a director of the respondent, affirmed on 1 April 1999, 6 May 1999 and 28 May 1999 respectively. The petitioner has opposed the motion and has filed in reply the affidavits of Thou Lek affirmed on 15 April 1999 and Sim Peng Guan affirmed on 13 May 1999.

At the outset, counsel for the petitioner has raised a preliminary issue G of law relating to the interpretation and application of ss 221 and 222 of the Companies Act 1965. More specifically, he raises the question of whether or not this court is empowered to grant the respondent's application for stay of the winding-up petition taken out by the petitioner against the respondent in the light of the factual situation in the instant case.

H Turning first to s 221, it seems that the respondent is relying on sub-s (2)(f) which stipulates:

> (2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition — ...
>
> I (f) give such directions as to the proceedings as the Court thinks fit.

Quite clearly, the subsection in question relates to incidental powers of the Court (see *The Annotated Statutes of Malaysia* on Companies Act 1965

(1999 Reissue) at pp 637–640). Indeed, s 221 as a whole is only applicable in a situation where the winding up petition is being heard. It is not applicable to the present application because the actual winding-up petition (encl 1) has yet to come up for hearing.

I now come to s 222 which states:

> *Power to stay or restrain proceedings against company*
>
> At any time after presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

It has been said that there are two High Court cases which have given conflicting interpretations on s 222. They are *Foursea Construction (M) Sdn Bhd* [1998] 4 MLJ 99 and *Shing Hup Hin Construction Sdn Bhd v General Soil Engineering Sdn Bhd* [1999] 1 MLJ 167. I have had the opportunity of reading those cases. Whether their decisions can be said to be actually conflicting is, I think, a moot point. In any event, what is more significant is that in *Shing Hup Hin Construction*, the court certainly had the opportunity and advantage of hearing full arguments on the interpretation and application of s 222 and further, the factual circumstances therein were more directly and materially in point. In my view, the learned judge had so admirably explained and analyzed the intricacies of that section that I do not find it necessary to say more. Suffice to say that I agree with him entirely. That being the position, I must conclude that having regard to the facts and circumstances of this case, this court has no power or jurisdiction under ss 221 or 222 of the Companies Act 1965 to entertain the respondent's motion for stay of the winding up petition. Accordingly, on that ground alone, it is sufficient that I dismiss it with cost.

Application dismissed.

Reported by Benjamin Yong